PP

v.

MOHD FARID MOHD SUKIS & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL TRIAL NO: 45-24-2000]
1 JULY 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Ingredients - Whether prima facie case made out - Whether doubt raised on prosecution case - Failure by prosecution to call material witness - Whether fatal - Dangerous Drugs Act 1952, ss. 2, 37(da), (da)(vi), 39B(1)(a), 39B(2)*

EVIDENCE: *Information leading to fact discovered - Admissibility of statement - Principles applicable - Whether voluntariness pre-condition for admissibility - Trafficking in dangerous drugs - Information leading to discovery of drugs - Whether drugs must be recovered from a place of concealment - Evidence Act 1950, ss. 27, 34*

The two accused here were jointly charged with trafficking in 4069.1 grams of cannabis under s. 39B(1)(a) Dangerous Drugs Act, 1952. Before the learned judge, evidence was led by the prosecution: (i) that the drugs in question were discovered from the house of the second accused; (ii) that one Ahmad Suhaimi was arrested by the police outside the house; (iii) that upon entering the house, PW4 saw the first accused cutting a compressed slab which was confirmed to be cannabis weighing 1032.4 grams; (iv) that as a result of information supplied by the first accused, three other slabs of cannabis were discovered from a room in the house; (iv) that the second accused, who appeared from the rear of the house, ran away upon seeing the police but was arrested after a chase; and (v) that apart from the second accused, his wife and his mother were also staying at the house. Upon the evidence adduced, the learned judge ruled, at the end of the prosecution case, that no *prima facie* case had been made out against the second accused, and in the circumstances, acquitted and discharged him. The learned judge however called for the first accused to enter his defence, albeit on an amended charge of trafficking in 1032.4 grams of cannabis.

The first accused raised a defence that he did not cut the slab of cannabis as alleged and that it was Ahmad Suhaimi who had placed the slab in the hall of the house. He further argued that it was unsafe for the court to accept the evidence of PW4, as he had testified during cross-examination that all the four

slabs of cannabis had not been cut. The main issue that arose was whether the defence, upon the totality of the evidence adduced, had created a reasonable doubt in the case of the prosecution. The facts further showed that the prosecution had not called Ahmad Suhaimi as a witness, and that being so, a question further arose as to whether the failure to call the witness was fatal to the prosecution case.

Held:

[1] The information supplied by the accused that "ada 3 ketulan lagi di bawah katil dalam bilik" is admissible without the need to hold a trial within a trial as voluntariness in not a condition of admissibility under s. 27 of the Evidence Act 1950. However, in view of the further application by the accused that the court ought to exclude the evidence in exercise of its discretion, a trial within a trial to determine its admissibility is appropriate. (pp 823 h & 824 d-e)

[2] *Goi Ching Ang v. PP* cannot be understood to mean that a s. 27 statement must be excluded in all instances where it was supplied involuntarily. This must be so as the Federal Court made it clear that it was considering the exclusion of the s. 27 statement "on the facts of this case". It follows that, in considering the exclusion of a s. 27 statement on the ground of involuntariness, the court must take into account the facts of the case and the degree of the force used. (pp 826 g-h & 827 a-c)

[2a] The defence case here was that the first accused had supplied the information after the police had agreed not to take any action against the second accused and his wife. If the first accused had the coolness and the freedom of mind to negotiate with the police before supplying the information, then the force used was not severe enough as to warrant the exclusion of the information. (p 827 c-d)

[3] In order to show that the accused persons had acted with common intention, the prosecution must prove that there was a link between them with regard to the cannabis that was recovered. In the present case, the only link adduced was that the house belonged to the second accused and that he had run away upon seeing the police party. However, these facts did not show that the second accused had anything to do with the cannabis recovered. The second accused was not in occupation of the room from which the three slabs were found and was not the only one living in the house. As to the act of running away, it was consistent

with innocence as he could have been in a state of pure panic. Consequently, no *prima facie* case had been made out against the second accused. (p 829 a & f)

[4] The fact that the first accused was seen cutting the slab which was confirmed to be cannabis weighing 1,032.4 grams showed that he had custody and control of it. There was also evidence that the first accused knew that the slab he was cutting was dangerous drugs, as showed by the circumstances in which he supplied the information that led to the recovery of the three slabs from the room. The question asked by PW4, namely "mana ada baki barang lagi" was clear reference to other illicit objects apart from what the first accused was cutting. His answer showed that he had full knowledge of those objects. (p 832 g-h)

[4a] There was thus direct evidence of possession by the first accused as far as the slab he was cutting was concerned. There was however no evidence to show that he had custody and control of the three slabs although he had knowledge of them. The three slabs therefore could not form the subject matter of the charge against him. Hence, the charge against the first accused ought to be amended accordingly. (p 836 h & 837 a-d)

[5] This court, at the close of the prosecution case, had accepted PW4's evidence that he saw the first accused cutting the slab of cannabis in the said house. However, upon reviewing this finding against the background of the totality of the evidence adduced, doubt had been created in respect of this initial finding. (p 843 c)

[6] PW4's evidence that he saw the first accused cutting the slab was weakened by his subsequent testimony during cross examination that all the four slabs recovered were not cut. PW4's attempt to explain the contradiction showed that his earlier evidence that he saw the first accused cutting the slab was based on the marks found on the slab. If this was true, then PW4 would not have seen the first accused cutting the slab and the first accused, in turn, could not have been in possession of the slab. Clearly, this evidence could create a reasonable doubt in the prosecution case. It could also support the defence version that the slab of cannabis was placed in the hall by Ahmad Suhaimi. (p 843 d-h)

[7] The question of whether the defence advanced is capable of raising a reasonable doubt is very much dependent on the evidence of Ahmad Suhaimi. He therefore ought to have been called as a witness. In view of the significance of his evidence an adverse inference must be drawn against the party bearing the burden to call him as a witness. (pp 843 i & 844 a)

[7a] The first accused's evidence that Ahmad Suhaimi had placed the slab of cannabis in the hall had nothing to do with trafficking but relates rather to the question of possession. Possession is an element which the prosecution must establish before any presumption of trafficking can be invoked. This being the case, the responsibility of calling Ahmad Suhaimi as a witness falls squarely on the shoulders of the prosecution. (p 844 e-f)

[8] The prosecution's failure to call Ahmad Suhaimi as a witness is fatal as it warrants the drawing of an adverse inference against them. The fact that Ahmad Suhaimi was offered to the defence did not alter this obligation of the prosecution to call him as a witness. The prosecution has thus failed to negate the doubt that had been created. (p 845 c-d)

[Second accused acquitted at end of prosecution case; first accused acquitted at end of defence case.]

Case(s) referred to:

Abu Bakar v. R [1963] MLJ 288 ***(refd)***
Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 ***(refd)***
Abdullah Zawawi v. PP [1985] 2 MLJ 16 ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 ***(refd)***
Amin & Anor v. The State AIR [1958] All 293 ***(refd)***
Baharom v. PP [1960] MLJ 249 ***(refd)***
Chan Pean Leon v. PP [1956] MLJ 237 ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 ***(refd)***
Cleland v. R [1982] 151 CLR 1 ***(refd)***
Cohen Lorraine Philis & Anor v. PP [1989] 3 MLJ 289 ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 MLJ 232 ***(refd)***
Dilworth & Ors v. The Commissioner of Stamps [1899] AC 99 ***(refd)***
Director of Public Prosecutions v. Wishart Brooks [1974] AC 862 ***(refd)***
Goh Ah Yew v. PP [1949] MLJ 150 ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 ***(refd)***
Kantilal Shah v. Charity Commissioners [1975] 16 Guj UR 594 ***(refd)***
Liew Siew & Anor v. PP [1969] 2 MLJ 232 ***(refd)***
Liow Tow Thong v. Pentadbir Tanah Alor Gajah [1998] 1 MLJ 79 ***(refd)***
Madras Central Urban Bank Ltd v. Corporation of Madras AIR [1932] Mad 474 ***(refd)***
Mahbub Shah v. King-Emperor [1945] AIR PC 118 ***(refd)***
McDermott v. The King [1948] 76 CLR 501 ***(refd)***
Md Desa Hashim v. PP [1995] 4 CLJ 677 ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 ***(refd)***
Namasiyiam & Ors v. PP [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 ***(refd)***
Neo Koon Cheo v. R [1959] MLJ 47 ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***

Ong Chee Hoe & Anor v. PP [1999] 4 SLR 688 ***(refd)***
PP v. Abdul Kudus Japlus [1988] 2 CLJ 812; [1988] 2 CLJ (Rep) 170 ***(not foll)***
PP v. Badrulsham Baharom [1988] 2 MLJ 585 ***(refd)***
PP v. Basri Salihin [1993] 1 CLJ 420 ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 ***(refd)***
PP v. Hairul Din Zainal Abidin [2001] 6 CLJ 480 ***(refd)***
PP v. Hashim Hanafi (Criminal Trial No: 45-26-2001) (unreported) ***(refd)***
PP v. Muhamad Nasir Shahabuddin & Anor [1994] 2 MLJ 576 ***(refd)***
PP v. Nik Ahmad Aman Nik Mansor [2002] 6 CLJ 369 ***(refd)***
PP v. Phua Keng Tong [1986] 2 MLJ 279 ***(refd)***
PP v. Sundaravelu [1967] 1 MLJ 79 ***(refd)***
Pulukuri Kottaya & Ors v. Emperor AIR [1947] PC 62 ***(refd)***
R v. Bradshaw [1978] 18 SASR 83 ***(refd)***
R v. Chalkley [1998] 2 All ER 155 ***(refd)***
R v. Dugan [1984] 2 NSWLR 554 ***(refd)***
R v. Lee [1950] 82 CLR 133 ***(refd)***
R v. Rowley [1986] 23 A Crim R 371 ***(refd)***
Re New Asiatic Co AIR [1967] Pun 14 ***(foll)***
Shaiful Edham Adam & Anor v. PP [1999] 2 SLR 57 ***(refd)***
Sim Teck Ho v. PP [2000] 4 SLR 39 ***(refd)***
Smith v. R [1957] 97 CLR 100 ***(refd)***
State of Himachal Pradesh v. Jeet Singh [1999] 2 LRI 53 ***(foll)***
Tan Ah Tee & Anor v. PP [1980] 1 MLJ 49 ***(refd)***
Tan Foo Su v. PP [1967] 2 MLJ 19 ***(refd)***
Tan Hung Song v. R [1951] MLJ 181 ***(refd)***
Teh Geok Hock v. PP [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 ***(refd)***
Too Yin Sheong v. PP [1999] 2 SLR 682 ***(refd)***
Van Der Meer v. R [1988] 62 ALJR 656 ***(refd)***
Warner v. Metropolitan Police Commissioner [1969] 2 AC 256 ***(refd)***
Wendo v. R [1964] 109 CLR 559 ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 ***(foll)***
Yee Ya Mang v. PP [1972] 1 MLJ 120 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(da)(vi)
Evidence Act 1950, s. 27
Penal Code, s. 34

Misuse of Drugs Act 1973 [Sing], s. 12(a)
Police and Criminal Evidence Act 1984 [UK], s. 78

Other source(s) referred to:
Andrew Christopher Simon, *Mallal's Penal Law*, p 51
Kerry Stephens, *Voir Dire Law*, pp 7, 58

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For the 2nd accused - Rusli Zain; M/s Rusli Zain & Assoc
For the prosecution - Ahmad Bache DPP

Reported by WA Sharif

JUDGMENT

Augustine Paul J:

Mohd Farid bin Mohd Sukis ("the first accused") and Mohamad Rasol bin Othman ("the second accused") were jointly charged with trafficking in dangerous drugs. The charge reads as follows:

> Bahawa kamu pada 9.10.1999 lebihkurang jam 11.00 pagi, di rumah No. 170, Jalan 2/12B, Kg. Batu Muda, Jalan Ipoh, dalam daerah Sentul, dalam Wilayah Persekutuan Kuala Lumpur, dalam meneruskan niat bersama kamu telah didapati mengedar dadah berbahaya iaitu 4,069.1 gram cannabis. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dibaca bersama seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952.

Both the accused persons claimed trial to the charge. On 9 October 1999 at about 11am Inspector Wan Azlan bin Wan Mamat (PW4) led a team of police officers to premises number 170, Jalan 12/12B, Kampong Batu Muda, Kuala Lumpur ("the house"). PW4 led one group of officers into the house. As he said:

> Apabila sampai di hadapan pintu saya dapati pintu terbuka sedikit. Saya terus menolak pintu tersebut. Saya dapati di hadapan pintu iaitu di dalam rumah terdapat satu lelaki sedang dalam keadaan mencangkung dan sedang memegang sebilah pisau di mana sedang memotong satu ketulan mampat yang berjenama Thai ISO 9002 (1999) Discovery For You di atas sehelai keratan akhbar di dalam dulang besi. Kemudian saya terus memperkenalkan diri polis dan mengarahkan lelaki tersebut berdiam diri.

PW4 arrested that person who is the first accused. At the same time another male person suddenly appeared from the kitchen. When he saw the police officers he ran towards the back of the house. Detectives Amir Hassan and Romli chased him. In the meanwhile another person called Ahmad Suhaimi, who was arrested outside the house, was brought in by Inspector Rajendran. Soon afterwards detectives Amir Hassan and Romli brought in the person whom they had chased. He is the second accused. Ahmad Suhaimi was handcuffed alone while the first and second accused were handcuffed together. PW4 then interrogated them. He added:

Kemudian saya telah menjalankan soalsiasat atas ketiga-tiga suspek dan hasil soalsiasat OKTI telah membawa saya dan pasukan ke sebuah bilik di sebelah ruang tamu rumah tersebut dan telah menunjukkan ke arah katil di dalam bilik tersebut. Kemudian Insp Rajendran telah mengangkat tilam katil di bilik itu dan dapati di bawah katil terdapat tiga lagi ketulan mampat bahan disyaki ganja bercop Golden Rabbit Brand Tis 00385. Kemudian OKTI telah mengambil tiga ketulan mampat tersebut dan serah kepada saya.

With regard to the information that led to the recovery of the objects PW4 said:

OKTI telah mengambil tiga-tiga ketulan mampat disyaki ganja dan serahkan kepada saya. Soalsiasat dilakukan sebelum penemuan ketiga ketulan mampat. OKTI ada bercakap dengan saya. Q: What are the exact words OKTI told you? J: OKTI memberitahu saya ada 3 ketulan lagi di bawah katil dalam bilik. Itu sahaja.

PW4 took possession of a steel tray, the knife, a newspaper and the four slabs suspected to be cannabis from the house. He then took the three persons and the exhibits to the police station where he marked the latter. As he said:

Pada satu dulang besi saya tandakan A. Pada satu keratan akhbar saya tandakan B. Pada sebilah pisau saya tandakan C. Satu ketulan mampat cop Thai IS0 9002 (1999) Discovery For You saya tandakan D. Tiga ketulan mampat cap Golden Rabbit Brand Tis 00835 saya tandakan E, F dan G. Saya ada lihat I.O. buat penandaan.

In this regard he said further:

(P6 dirujuk kepada saksi) Inilah yang saya tanda A. P26 ialah yang saya tandakan C. P15 ialah yang saya tandakan D. Ketika itu ada kandungan. P16 ialah yang saya tandakan E. Ketika itu ada kandungan. P17 ialah yang saya tanda F. P18 yang saya tandakan G. Ketiga ada kandungan. (Saksi dirujuk kepada P7B) Inilah keempat-empat ketulan pada asalnya. P7A ialah pisau, dulang dan suratkhabar. Saya tak pernah lihat plastik P19-P22.

At about 1.30pm PW4 handed the exhibits to Inspector Ho Chee Khun (PW3). In his cross-examination PW4 said:

Saya tidak setuju OKT tidak memotong ketulan mampat … . Soalan yang saya tanya OKT ialah: Mana ada baki barang lagi? (Saksi dirujuk kepada P7B) Saya setuju keempat-empat ketulan ini tidak dipotong.

As to whether he could have recovered the cannabis from the room himself he said:

Jika tidak terdapat apa-apa dadah di ruang tamu saya akan membuat pemeriksaan di rumah itu. Jika saya membuat pemeriksaan sendiri di rumah itu saya akan menjumpai dadah dari bilik itu. Tetapi ambil masa yang lama.

In his re-examination on this issue PW4 said:

Oleh kerana rumah tersebut didapati mempunyai access ke rumah sebelah melalui bahagian belakang saya terpaksa membuat pemeriksaan di keseluruhan kedua-dua rumah itu. Saya terpaksa menggeledah kedua-dua rumah. (Saksi dirujuk kepada P8 A-H) Kalau saya periksa masa yang diambil ialah lebihkurang dua jam.

In explaining why he said in cross-examination that the four slabs were not cut he said:

Saya ada kata keempat-empat ketulan itu tidak dipotong.

Q: Tetapi dalam soalan utama awak ada jawab: 'Apabila sampai di hadapan pintu saya dapati pintu terbuka sedikit dan saya terus menolak pintu tersebut. Saya dapati di hadapan pintu di dalam rumah tersebut terdapat satu lelaki sedang di dalam keadaan mencangkung sedang memegang sebilah pisau sedang memotong satu ketulan mampat yang berjenama Thai ISO 9002 (1999) Discovery For You.' Apa penjelasan awak?

A: Saya rujuk kepada P7B pada ketulan mampat berjenama Thai ISO 9002 ada terdapat sedikit kesan terpotong.

Q: Apa penjelasan awak?

A: Ini yang betul. Apabila disoal oleh peguam saya terlupa ada kesan pada ketulan mampat itu. (Saksi dirujuk kepada P15) Di sini ada kesan.

PW3 said that Ahmad Suhaimi was released. He confirmed that he received the exhibits from PW4. With regard to exh. D he said:

Saya juga terima satu ketulan bahan mampat cop Thai ISO 9002 (1999) Discovery For You bertanda D. Yang mana di tengah-tengah ketulan mampat tersebut ada kesan dipotong.

On 14 October 1999 he sent the exhibits to the Fingerprint Division of Bukit Aman for fingerprint dusting. On 15 October 1999 he received back the exhibits together with a report (exh. P11). The report was served on both the accused persons on 28 May 2000. The material part of the report reads as follows:

Cap jari yang boleh digunakan untuk perbandingan tidak diperolehi.

On 16 October 1999 he sent the exhibits to the Chemistry Department for analysis. He received back the exhibits together with a chemist report (exh. P13) on 4 January 2000. On 23 March 2000 he served a copy of the report on the accused persons. The material part of the report reads as follows:

I examined the box 'A' submitted and found it to contain 4 compressed slabs of plant material each wrapped with plastic sheet and secured with cellophane tape and were marked from 'D' to 'G'. Slab 'D' also bore a blue 'Thai' label while each of slabs 'E', 'F' and 'G' bore a white 'GOLDEN RABBIT BRAND' label. The nett weight of the slabs of plant material are shown below:

Slab	Nett weight of plant material (grams)
'D'	1032.4
'E'	967.9
'F'	1017.2
'G'	1051.6
Total	4,069.1

> On analysis, I found all the plant material of the above 4 slabs 'D' to 'G', a total of 4,069.1 grams to be 'cannabis'.

PW3 also sent the knife to the Chemistry Department for analysis on 2 August 2000. He received back the knife together with a report (exh. P24) on 7 September 2000. He served a copy of the report on the accused persons on 13 October 2000. The material part of the report reads as follows:

> I examined the envelope 'C' submitted and found it to contain a knife marked 'C' on which I found 'cannabis' resin.

Norlinda binti Jamaluddin (PW5) is the wife of the second accused. She said that on 9 October 1999 the persons staying at the house were the second accused, his mother, she herself and their child. When the police raided the house on that day she was bathing the child, then a month old, together with the second accused. She then said:

> Masa saya lahirkan anak saya saya tidak menggunakan bilik dalam gambar P8D. Dari tarikh saya melahirkan anak sehingga hari kejadian saya tidak menggunakan bilik itu. Tidak ada sesiapa yang gunakan bilik itu. Suami saya tidur bersama-sama dengan saya.

She added that the second accused used the room to change his clothes. She said that she has known the first accused for about six months prior to the incident. He stayed close to the house. He used to come to the house about two to three times a week. With regard to the drugs recovered from the house she said:

> Saya tidak tahu berkenaan dengan dadah yang dijumpai dalam bilik itu. Saya juga tidak tahu berkenaan dengan dadah lain yang dijumpai. (Saksi dirujuk kepada P7B) Saya tak pernah lihat ini. Ini bukan dadah saya punya.

In her cross-examination she said that apart from the first accused other friends of the second accused also used to come to the house.

The prosecution then closed its case. Before dealing with the submissions made by both parties at that stage I shall first consider the arguments raised and the rulings made by me in the course of the prosecution case in relation to the information supplied by the accused under s. 27 of the Evidence Act 1950 ("s. 27").

When PW4 testified that the first accused led him to the recovery of the three compressed slabs suspected to be cannabis the defence immediately objected to the admissibility of the statement relating to the discovery. Clearly this objection was pre-mature. PW4 had not given any evidence of the information that had been supplied to him yet. He merely gave evidence of the discovery. That, in fact, is the correct procedure to be followed in giving evidence of information received under s. 27. Evidence of discovery must first be given followed by evidence of the information that led to it (see *Tan Hung Song v. R* [1951] MLJ 181). Accordingly, I advised the defence to raise the objection at the appropriate stage.

In then continuing with his evidence PW4 said:

> OKTI memberitahu saya ada 3 ketulan lagi di bawah katil dalam bilik.

He said that it was in answer to the question:

> Mana ada baki barang lagi?

The defence argued that this evidence is not admissible under s. 27 as it was not voluntarily made and thus a trial within a trial must be held to rule on its admissibility. In support of the objection raised reliance was placed on *Goi Ching Ang v. PP* [1999] 1 CLJ 829. In my opinion the authority relied on does not support the argument advanced. On the contrary that case, in declining to follow the earlier case of *Md Desa bin Hashim v. PP* [1995] 4 CLJ 677, emphatically ruled that voluntariness is not an issue in the admissibility of evidence under s. 27 though such evidence was excluded in the exercise of the discretion of the court on that ground. Normally a trial within a trial is held to determine the admissibility of evidence which requires certain conditions to be proved before it can be admitted. Thus in the case of a confession the pre-condition of its admissibility is voluntariness and a trial within a trial must be held to determine whether it was voluntarily made before it can be admitted. Where evidence sought to be admitted is not subject to any such pre-conditions it must be admitted without subjecting it to a trial within a trial. Accordingly, I ruled that the information supplied by the accused is admissible without the need to hold a trial within a trial as voluntariness is not a condition of admissibility under s. 27. This was promptly followed by a further application from the defence, that I ought to exclude the evidence in the exercise of my discretion as it was involuntarily obtained and would thus be unfair to the

accused. It was argued that *Goi Ching Ang v. PP* [1999] 1 CLJ 829 enunciates that any information supplied under s. 27 involuntarily must be excluded in the exercise of the discretion of the court. I shall first consider the procedure to be followed in an application of this nature. In inviting both parties to submit on this issue I referred certain authorities to them for their consideration. At the resumed hearing the parties were generally agreeable to the applicable law. The Australian courts have held that the party seeking to have evidence ruled inadmissible in the exercise of the discretion of the court has the onus of showing, on the balance of probabilities, that the discretion should be exercised in that way (see *R v. Lee* [1950] 82 CLR 133; *Wendo v. R* [1964] 109 CLR 559; *Cleland v. R* [1982] 151 CLR 1; *Van Der Meer v. R* [1988] 62 ALJR 656). As Kerry Stephens says in his book entitled *Voir Dire Law* at p. 58:

> It follows that the party seeking the exclusion of the evidence must satisfy the court that the circumstances are such that the court should exercise its discretion in favour of the party making the application.

The appropriate way of dealing with an application of this nature is by way of a trial within a trial (see *Smith v. R* [1957] 97 CLR 100; *R v. Bradshaw* [1978] 18 SASR 83; *R v. Rowley* [1986] 23 A Crim R 371). However, in *R v. Dugan* [1984] 2 NSWLR 554 Street CJ expressed the view that a judge, in considering an application of this nature, "… must necessarily act upon such evidence as is placed before him either in the substantive trial or on the *voir dire*, or both" (at p. 559). In my opinion the holding of a trial within a trial is a more appropriate method to be followed. In support I refer to Kerry Stephens where he says at p. 7:

> ... if the *voir dire* procedure is not adopted a defendant is placed at a disadvantage because the impugned statement will not be excluded unless evidence arising during the prosecution case warrants that action. When a *voir dire* is not conducted an accused is placed in a situation where he or she can only give evidence during the substantive trial. … The result obviously places an accused at a serious disadvantage because had the admissibility of the statement been determined during the prosecution case it may not have been necessary for the defendant to give evidence during the trial proper.

The holding of a trial within a trial for the purpose under discussion will ensure that all relevant matters to facilitate the making of a ruling are addressed. If such a course is not followed material evidence may be overlooked as the issue will not be in focus. This will place the defence at a disadvantage. Needless to say, the evidence in dispute can be excluded based even on material available in the substantive trial itself on the issue.

In the light of the foregoing I ordered that a trial within a trial be held to determine the application made by the defence. Both the accused persons gave evidence. The first accused said that detective Amir pointed a pistol at him and he was assaulted. He gave full particulars of the way in which he was assaulted. He said that he finally agreed to give the information if the police do not take action against the second accused and his wife. When the police agreed to this request he gave the information. In his cross-examination he denied that he was not assaulted or that he gave the information voluntarily. The second accused corroborated the evidence of the first accused. In answer to the evidence adduced by the defence the prosecution called PW4 and detective Amir. They denied that the first accused was assaulted nor that any gun was pointed at him. They also denied making any promise to him in return for the supply of the information. In making a ruling on the evidence adduced by both parties it is first necessary to determine whether *Goi Ching Ang v. PP* [1999] 1 CLJ 829, where a s. 27 statement was excluded on the ground that it was involuntarily supplied, must be taken to mean that such statements must be excluded in all cases of involuntariness. In resolving the problem that I have posed it must be remembered that the exclusion of evidence in the circumstances now under deliberation is a matter of discretion. The exercise of a discretion cannot be fettered by laying down rules and regulations. If that is so, it will become a rule of law and cease to be an exercise of discretion. This has been stressed in a plethora of local cases. I consider it sufficient to refer to *PP v. Sundaravelu* [1967] 1 MLJ 79 where Raja Azlan Shah J (as His Highness then was) said at pp. 79-80:

> This application brings into review the provisions of section 310 of the Criminal Procedure Code (Cap 6). It is clear from the provisions of that section that this Court has a discretion whether or not to allow the application, but to my mind emphasis is laid on the phrase 'in order that substantial justice may be done in the matter.' I think the provisions of this section have been well gone into by the Court of Appeal in *Veerasingam*'s case [1858] MLJ 76. There it was said that the section is one of discretion and no hard and fast rules can be laid down, otherwise it ceases to be a discretion and becomes a rule of law.

As I said in *Liow Tow Thong v. Pentadbir Tanah Alor Gajah* [1998] 1 MLJ 79 at p. 86:

> It is a principle of long standing that a body charged with exercising discretion in the making of decisions must not, by its own act or decision, prevent itself from exercising that discretion properly (see *R v. Sevenoaks DC, exp Terry* [1985] 3 All ER 226).

Evidence cannot therefore be excluded in the exercise of the court's discretion by the automatic application of a pre-determined set of rules. In so saying I find support in *R v. Chalkley* [1998] 2 All ER 155 where Auld LJ, in dealing with the admissibility of evidence under s. 78 of the Police and Criminal Evidence Act 1984 on the ground of unfairness, said at pp. 177-178:

> We also say here, though it is strictly more relevant to Mr Cassel's submission about the balancing exercise undertaken by the judge, that we reject as contrary to the wording of s. 78 and the authorities that any conduct which may be typified as 'oppressive' automatically requires exclusion of evidence obtained thereby. Just as the labelling of conduct as unlawful does not necessarily affect its character for the purpose, nor does the application to it of the epithet 'oppressive' automatically override the fundamental test of fairness in admission of evidence. Oppressive conduct, depending on its degree and/or its actual or possible effect, may or may not affect the fairness of admitting particular evidence.

In this regard I also refer to *McDermott v. The King* [1948] 76 CLR 501 where Dixon J said at p. 513:

> In referring the decision of the question whether a confessional statement should be rejected at the discretion of the judge, all that seems to be intended is that he should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused.

In commenting on limits that may be set in the exercise of the discretion to exclude evidence Latham CJ, Mc Tierman, Webb and Fullagar JJ said in *R v. Lee* [1950] 82 CLR 133 at p. 151:

> What is impropriety in police methods and what would be unfairness in admitting in evidence against an accused person a statement obtained by improper methods must depend upon the circumstances of each particular case, and no attempt should be made to define and thereby to limit the extent or the application of these conceptions.

It follows that *Goi Ching Ang v. PP* [1999] 1 CLJ 829 cannot be understood to mean that a s. 27 statement must be excluded in all instances where it was supplied involuntarily. Neither does that case profess to lay down such a rule. It was made clear by the Federal Court that it was considering the exclusion of the s. 27 statement "On the facts of this case … " and as stated at p. 855:

> The facts and circumstances of the case show that the s. 27 information obtained has an adverse effect on the fairness of the proceedings so that the learned trial judge ought not to have admitted.

Therefore the Federal Court excluded the s. 27 statement on the facts of that case. The rule is therefore not of universal application. It depends on the facts of each case. Thus the ratio that can be gleaned from *Goi Ching Ang v. PP* [1999] 1 CLJ 829 is that a court, in considering the exclusion of a s. 27 statement on the ground of involuntariness, must take into account the facts of the case and the degree of force used. In my opinion the degree of involuntariness that can be said to be sufficient to exclude a s. 27 statement in the exercise of the discretion of the court must be balanced against the fact that involuntariness is not a condition of admissibility of such a statement. Therefore the circumstances of involuntariness must indeed be extraordinary in order to exclude a statement on a ground which, in the first place, does not affect its admissibility in law. In this case the defence evidence is that the first accused supplied the information after the police had agreed not to take any action against the second accused and his wife. If the first accused had the coolness and the freedom of mind to negotiate with the police before supplying the information I am of the view that the force used was not severe enough to warrant the exclusion of the information. In the circumstances I declined to exercise my discretion to exclude the information supplied by the first accused.

I shall now deal with the submission of no case made by the defence and, in so doing, consider the case against the second accused first.

The Case Against The Second Accused

The evidence adduced by the prosecution against the second accused is that when the police were in the house he suddenly appeared from the back. Upon seeing the police he ran but was chased and caught. The house was occupied by him, his wife (PW5) and his mother. The first accused and some other friends of the second accused used to visit the house. At the time of the police raid the second accused and PW5 did not stay in the room from where the three compressed slabs of cannabis were recovered though he used to go there to change his clothes. The first accused, with whom he was charged jointly, was seen cutting a compressed slab of cannabis in the hall and in addition also supplied information which led to the recovery of three other slabs. Learned counsel for the second accused contended that the evidence does not disclose the existence of a common intention between both the accused persons. In his submission the learned deputy public prosecutor contended that the fact the house belongs to the second accused and that he occupied the room from where the drugs were recovered coupled with the fact that he ran away upon seeing the police show that the drugs are his. He said that the defence also did not suggest that the drugs belonged to PW5, Ahmad Suhaimi or the second accused's mother. In support of his argument he referred to *Dato' Mokhtar bin Hashim & Anor v. PP* [1983] 2 MLJ 232 and *Namasiyiam and Others v. PP* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241.

It must be observed that both the accused persons have been charged with committing the offence with common intention under s. 34 of the Penal Code which reads as follows:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

This section lays down a rule of evidence to infer joint responsibility for a criminal act committed by several persons (see *Too Yin Sheong v. PP* [1999] 2 SLR 682). In order for the section to apply it is not necessary for all the participants to perform all the elements of the crime committed. As *Mallal's Penal Law* edited by Andrew Christopher Simon says at p. 51:

> The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise. For instance, one may only stand guard to prevent any person coming to the relief of the victim or otherwise to facilitate the execution of the common design. Such a person also commits an 'act' as much as his co-participants, actually committing the planned crime.

Thus the section operates to impute liability to a participant whose act contributed to the crime committed though he could not be proved to have committed the *actus reus* himself (see *Shaiful Edham bin Adam & Anor v. PP* [1999] 2 SLR 57). It is essential that the participants have some knowledge that an act may be committed which is consistent with or would be in furtherance of the common intention. The prosecution must establish that there was a pre-arranged plan to commit a criminal act and the crime forming the subject matter of the charge was done in concert pursuant to that pre-arranged plan (see *Dato' Mokhtar bin Hashim & Anor v. PP* [1983] 2 MLJ 232; *Ong Chee Hoe & Anor v. PP* [1999] 4 SLR 688). It is difficult to prove common intention by direct evidence. It is usually inferred from the facts of a particular case. As observed by the Privy Council in *Mahbub Shah v. King-Emperor* [1945] AIR PC 118:

> It is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual, in most cases it had to be inferred from his act or conduct or other relevant circumstances of the case.

The law that I have discussed shows that in order to establish that the accused persons acted with common intention the prosecution must show that there is a link between them with regard to the cannabis that was recovered. The only evidence adduced to establish this link is the fact that the house is that of the second accused ("the first fact") and that he ran away upon seeing the police officers ("the second fact"). With regard to the first fact there is evidence to show that the house was occupied by two other adults and that others had access to it. Evidence was led to show that one of the adults, the second accused's wife (PW5), had nothing to do with the drugs. However, no evidence was led by the prosecution to negate the liability of the other adult, the mother of the second accused. The second accused was also not in occupation of the room from where the three slabs of compressed cannabis were recovered at the material time. It follows that the first fact cannot be held against the second accused to show that he had anything to do with the cannabis recovered. With regard to the second fact I refer to *PP v. Chia Leong Foo* [2000] 4 CLJ 649 where I said at p. 664:

> But evidence of mere absconding or flight is not such a vital circumstance which can be considered to show that the absconder was having any guilty mind (see *Bhagat Bahadur v. State* [1996] Cri LJ 2001). Such conduct must be considered in the totality of the evidence adduced (see *Mansor bin Mohd Rashid*'s case). For it to be capable of amounting to an admission of guilt there must be a nexus between his conduct, his flight and the offence in question.

Judged against the background of what I have said with regard to the first fact there is no nexus between the drugs seized and the act of the second accused in running away. In the absence of such evidence the second fact is also consistent with the innocence of the second accused as he could have been in a state of pure panic (see *Abdullah Zawawi bin Yusoff v. PP* [1993] 4 CLJ 1). Therefore there is no evidence, either direct or by way of inference, of any relationship between the two accused persons with regard to the offence they had been charged with. In the circumstances I ruled that the prosecution had not made out a *prima facie* case against the second accused and accordingly acquitted and discharged him without calling upon him to enter his defence.

The Case Against The First Accused

PW4 found the door of the house opened slightly. On pushing the door he saw the first accused squatting in the hall cutting a compressed slab suspected to be cannabis with a knife on a steel tray. When Ahmad Suhaimi and the second accused were brought into the hall the three of them were interrogated. In answer to the question "Mana ada baki barang lagi" the first accused said, as testified by PW4, "OKTI memberitahu saya ada tiga ketulan lagi di bawah katil dalam bilik." The first accused then took the three compressed slabs

suspected to be cannabis from under the bed in the room and handed them to PW4. The four slabs were confirmed to be cannabis by the chemist. The weight was 4,069.1 grammes.

In his submission learned counsel said that the evidence of PW4 that he saw the first accused cutting the slab of cannabis must be viewed with suspicion. This is because PW4 had said in cross-examination that it was not cut. This is supported by the fact that no fingerprints of the accused were found on the knife. Learned counsel said that all these led to the inference that the first accused was not cutting the drugs. With regard to the drugs found in the room he said it was not a "discovery" within the meaning of s. 27 as the police had prior knowledge of the drugs in the house based on information received. In support of this argument he referred to *PP v. Muhamad Nasir bin Shahabuddin & Anor* [1994] 2 MLJ 576 and *PP v. Basri bin Salihin* [1993] 1 CLJ 420. Learned counsel also added that the fact that PW4 could have recovered the drugs on his own meant that s. 27 was inapplicable. In any event, he said, the information supplied only shows knowledge which is insufficient to establish possession. In his reply the learned deputy public prosecutor said that the evidence that the first accused was seen cutting the slab of cannabis is supported by the traces of cannabis resin found on the knife. He said that this shows that the first accused was in exclusive possession of the slab that he was cutting. With regard to the three slabs of cannabis recovered from the room he said that the information supplied by the first accused which led to their discovery is admissible under s. 27. He further argued that in order to render a s. 27 statement admissible it is not necessary for the object recovered to be hidden based on authorities such as *PP v. Abdul Kudus bin Japlus* [1988] 1 CLJ 812; [1988] 2 CLJ (Rep) 170 and *Wong Nam Loi v. PP* [1998] 1 CLJ 37. Thus, he said, the fact that the police could have found the drugs on their own makes no difference to the admissibility of the information supplied. He concluded by saying that the information supplied by the first accused is sufficient to show that he had possession of the three slabs recovered.

I shall first deal with the issues of law arising from the submissions. In support of his argument that the object recovered need not have been hidden the learned deputy public prosecutor had relied on *PP v. Abdul Kudus bin Japlus* [1988] 2 CLJ 812; ([1988] 2 CLJ (Rep) 170) where KC Vohrah J (as he then was) said at p. 814 (pp. 172-173):

> His objection was that the information by the accused did not lead to the 'recovery' of the drug and that on the basis of *Yee Ya Mang v. Public Prosecutor* [1972] 1 MLJ 120 the thing recovered should in the first place have had the characteristic feature of having been 'hidden'. With great respect

> to learned counsel, the provisions of section 27 of the Evidence Act 1950 have been misconstrued and *Yee*'s case did not decide that the thing recovered must in the first place have been 'hidden'.

A proper construction of the language employed in s. 27 will readily provide the answer to the problem at hand. The section refers to a fact "discovered". The word "discover" is defined in *Black's Law Dictionary* 6th edn as:

> To uncover that which was hidden, concealed, or unknown from every one. To get first sight or knowledge of; to get knowledge of what has existed but has not theretofore been known to the discoverer. *Shellmar Products Co v. Allen-Qualley Co*, CCA A Jll 87 F 2d 104, 108.

Yee Ya Mang v. PP [1972] 1 MLJ 120 itself refers to a passage from the celebrated case of *Pulukuri Kottaya & Others v. Emperor* AIR [1947] PC 62 where it is said:

> Normally the section is brought into operation when a person in police custody produces from a place of concealment some object … … …

In *PP v. Basri bin Salihin* [1993] 1 CLJ 420 Visu Sinnadurai J referred to *Re New Asiatic Co* AIR [1967] Pun 14 where it was held that a disclosure statement only has any meaning at all if the place from where the incriminating article was recovered is really a place of concealment which it would be difficult or impossible for the police to discover without some assistance from the accused. Thus the language of s. 27 will preclude the application of the section if the thing recovered is not from a place of concealment. I am therefore unable to agree, with respect, with the view expressed in *PP v. Abdul Kudus bin Japlus* [1988] 2 CLJ 812; [1988] 2 CLJ (Rep) 170 by KC Vohrah J (as he then was) that the thing recovered need not have the characteristic feature of being hidden. In laying down the correct test of concealment within the meaning of s. 27 KT Thomas J said in the Indian Supreme Court case of *State of Himachal Pradesh v. Jeet Singh* [1999] 2 LRI 53 at pp. 59-60:

> There is nothing in s 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is 'open or accessible to others'. It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under s. 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried on the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence the crucial question is not

> whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.

The authorities that I have referred to show that so long as the object is produced from a place of concealment the information supplied is admissible even if the place of concealment is accessible to others and even though the object could have been otherwise discovered, though with some difficulty. This is of course subject to the qualification that there was no prior knowledge of the fact discovered. In support I refer to *Wong Nam Loi v. PP* [1998] 1 CLJ 37 where Shaik Daud JCA said at p. 41:

> Before the statement and gesture, there is no evidence to indicate that the police knew where the drug was, albeit it would have been discovered eventually. Nevertheless, it was discovered after the making of the statement.

The fact that the police could have discovered the drugs on their own after at least a two hour search as testified by PW4 shows that if they had done so it would not have been with ease. The admissibility of the information supplied by the first accused is therefore not affected by this part of the evidence of PW4. Of course if the object produced was not hidden and if in the normal course of investigation the police are bound to see them without the accused making any statement there is no discovery under s. 27 (see *Amin & Anor v. The State* AIR [1958] All 293). That is not the position in this case as the drugs recovered were under the bed which means that they were in a place of concealment. With regard to learned counsel's reliance on *PP v. Muhamad Nasir bin Shahabuddin & Anor* [1994] 2 MLJ 576 and *PP v. Basri bin Salihin* [1993] 1 CLJ 420 to argue that the information supplied by the first accused is not admissible as the police had prior knowledge of it. I have expressed disagreement with these cases in *PP v. Hashim bin Hanafi* (Kuala Lumpur Cr Trial No 45-26-2001) where I said that prior knowledge which will make s. 27 inapplicable must be of such a nature that it must be capable on its own of leading to the discovery of the object. There is no such prior knowledge in this case. Thus the objection raised cannot be sustained.

Learned counsel's submission that the credibility of PW4 is suspicious as, having said in his examination-in-chief that he saw the first accused cutting the slab he then said in cross-examination that it was not cut cannot be sustained. PW4 had adequately clarified the inconsistency in his re-examination. The marks on the slab recovered in the hall and on the knife support his evidence. I therefore accepted the evidence of PW4 that the first accused was cutting the slab which was confirmed to be cannabis weighing 1,032.4 grammes. This finding shows that he had custody and control of it. The further element that requires proof is that he had knowledge that it was cannabis. As I said

in *PP v. Chia Leong Foo* [2000] 4 CLJ 649 in reliance on cases such as *Chan Pean Leon v. PP* [1956] MLJ 237, *PP v. Badrulsham bin Baharom* [1988] 2 MLJ 585 and *PP v. Phua Keng Tong* [1986] 2 MLJ 279 proof of knowledge is very often a matter of inference. I consider it necessary to repeat what Thean J (as he then was) said in *PP v. Phua Keng Tong* [1986] 2 MLJ 279 at p. 286:

> However, in this case, like in many others, proof of knowledge or belief on the part of an accused is a matter of inference from facts. In the case of *RCA Corp v. Custom Cleared Sales Pty Ltd* [1978] FSR 576; 19 ALR 123, the Court of Appeal in New South Wales in dealing with the question of knowledge of infringement of copyright said at p. 478:
>
> > Except where a party's own statements or gestures are relied upon, proof of knowledge is always a matter of inference, and the material from which the inference of the existence of actual knowledge can be inferred varies infinitely from case to case.
>
> And the court further said, at p. 579:
>
> > It seems to us that the principle is more accurately put by saying that a court is entitled to infer knowledge on the part of a particular person on the assumption that such a person has the ordinary understanding expected of persons in his line of business, unless by his or other evidence it is convinced otherwise. In other words, the true position is that the court is not concerned with the knowledge of a reasonable man but is concerned with reasonable inferences to be drawn from a concrete situation as disclosed in the evidence as it affects the particular person whose knowledge is in issue. In inferring knowledge, a court is entitled to approach the matter in two stages; where opportunities for knowledge on the part of the particular person are proved and there is nothing to indicate that there are obstacles to the particular person acquiring the relevant knowledge, there is some evidence from which the court can conclude that such person has knowledge.

It must be observed that in proving this element the obligation of the prosecution is only to establish that the accused had knowledge, either by direct evidence or by way of inference, of the existence of the dangerous drug but not its qualities. This stand has been consistently taken by the Singapore Courts following *Warner v. Metropolitan Police Commissioner* [1969] 2 AC 256 which was approved in *Tan Ah Tee & Anor v. PP* [1980] 1 MLJ 49. It is sufficient for me to refer to *Sim Teck Ho v. PP* [2000] 4 SLR 39 where Yong Pung How CJ said at pp. 42-43:

The appellant was charged with trafficking in a controlled drug, an offence under s. 5(1)(a) of the Misuse of Drugs Act (Cap 185) ('the Act'). Section 5(2) of the Act states that a person commits the offence of trafficking in a controlled drug if he has in his possession that drug for the purpose of trafficking. Section 17(c) of the Act provides a presumption concerning trafficking. It states that any person proved to have possession of more than 2 g of diamorphine shall be presumed to have that drug in possession for the purpose of trafficking unless it is proved that his possession of that drug was not for that purpose.

The key issue in this appeal was whether the trial judge was right in finding that the appellant was in possession of the diamorphine contained in the bag. Numerous cases have established that possession encompasses the element of physical control as well as an element of knowledge. For example, in *Fun Seong Cheng v. PP* [1997] 3 SLR 523, it was said by Karthigesu JA, in delivering the judgment of the Court of Appeal:

> 53 … Clearly in order to prove that the appellant was in possession, he must have physical control over the drugs. It is a matter of fact whether someone had physical control over an item …
>
> 54 Physical control is not enough for the purpose of proving possession. There needs to be *mens rea* on the part of the accused.

Karthigesu JA went onto cite a portion of Lord Pearce's judgment in *Warner v. Metropolitan Police Commissioner* [1969] 2 AC 256, a decision of the House of Lords which involved the meaning of 'possession' for the purpose of s. 1 of the Drugs (Prevention of Misuse) Act 1964. Lord Pearce's *dicta* had been cited in extensio with approval by the Court of Appeal in *Tan Ah Tee v. PP* [1978-1979] SLR 211; [1980] 1 MLJ 49. Wee Chong Jin CJ in delivering the judgment of the court, said that the word 'possession' for the purpose of the Act should be construed as Lord Pearce had construed it. His Lordship had said in *Warner*:

> One may, therefore, exclude from the 'possession' intended by the Act the physical control of articles which have been 'planted' on him without his knowledge. But how much further is one to go? If one goes to the extreme length of requiring the prosecution to prove that 'possession' implies a full knowledge of the name and nature of the drug concerned, the efficacy of the Act is seriously impaired, since many drug pedlars may in truth be unaware of this. I think that the term 'possession' is satisfied by a knowledge only of the existence of the thing itself and not its qualities, and that ignorance or mistake as to its qualities is not an excuse.

> Therefore, in order to prove possession, the prosecution must prove that there is first, physical control over the controlled drug, and second, knowledge of the existence of the thing itself, that is the existence of the controlled drug, but not the name nor nature of the drug.

The manner of proving knowledge by inference can be seen in cases such as *Director of Public Prosecutions v. Wishart Brooks* [1974] AC 862 and *Neo Koon Cheo v. R* [1959] MLJ 47. Both these cases support the proposition that knowledge of the nature of the drugs possessed can be inferred from the circumstances of the case. In *Director of Public Prosecutions v. Wishart Brooks* [1974] AC 862 a number of police officers saw a van with its engine running parked on a lay-by near an airstrip. On the approach by the police officers, the respondent, who was the driver, and others who were in cab of the van attempted to run away. The respondent was caught by the police. In the body of the van, which was neither visible nor accessible from the cab, were 19 sacks containing over 1,000 pounds of ganja. The respondent's conviction was quashed by the Jamaican Court of Appeal on the ground that it was not shown that he had more than mere custody or charge of the van and its contents and that there was no evidence that he had possession of the ganja. The Privy Council, in allowing the appeal, held that the technical doctrines of the civil law about possession were irrelevant to this field of criminal law and added at pp. 866-867:

> In the ordinary use of the word 'possession', one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's physical control. This is obviously what was intended to be prohibited in the case of dangerous drugs. Question (1) and the reason given for the answer, however, suggest that, in addition to the mental element of knowledge on the part of the accused, which the Court of Appeal had chosen to deal with separately in questions (2) and (3), the word 'possession' imported into this criminal status as a necessary ingredient of an offence against public health the highly technical doctrines of the civil law about physical custody without ownership as a source of legal rights in the actual custodian against third parties and about the legal relationships between owner and custodian which bring about the separation of property and possessory rights in chattels. If this is the implication to be drawn from this part of the judgment in *Reg v. Livingston* [1952] 6 JLR 95 it is, in their Lordship's view, wrong. These technical doctrines of the civil law about possession are irrelevant to this field of criminal law. The only *actus reus* required to constitute an offence under s. 7(c) is that the dangerous drug should be physically in the custody or under the control of the accused. The *mens rea* by which the *actus reus* must be accompanied is the kind of knowledge on the part of the accused that is postulated in questions (2) and (3).

> Upon the evidence, including his own statement to the police, the 19 sacks of ganja were clearly in the physical custody of the respondent and under his physical control. The only remaining issue was whether the inference should be drawn that the respondent knew that his load consisted of ganja. Upon all the evidence and in particular the fact that he and other occupants of the van attempted to run away as soon as they saw the uniformed police approaching the magistrate was, in their Lordships' view, fully entitled to draw the inference that the defendant knew what he was carrying in the van.

In *Neo Koon Cheo v. R* [1959] MLJ 47 a raid was made by a detective sergeant, a detective corporal and a detective on the attic of No 26, New Bridge Road, on 21 January 1958 at about 8.20pm. On entering the attic, the detective corporal and the detective saw the appellant holding a confectionery tin in his hands and attempting to get out of the attic through an opening on the left side of the attic. On examination the tin was found to contain a phial of chandu, a small tin of chandu dross, an opium pipe-head, a rag and some tools. In holding, in the alternative, that the evidence was sufficient to make a case against the appellant for possession of prepared opium and smoking utensils Ambrose J said at p. 50:

> If my interpretation of s. 37(d) of the Ordinance is not correct, the conviction on the first charge can be supported without having recourse to the presumption under s. 37(d). The fact that the appellant was seen attempting to take the confectionery tin and its contents out of the attic as soon as the detectives entered the attic raises the inference that the appellant was endeavouring to put the tin and its contents out of sight and the further inference that he had knowledge of the nature of the contents of the tin. As the opium pipe-head and the chandu and chandu dross were found in the attic it must be presumed, until the contrary is proved, under s. 37(c) of the Dangerous Drugs Ordinance that the attic was used for the purpose of smoking of chandu by a human being and that the occupier permitted the attic to be used for such purpose. The appellant was not the occupier of the premises but a friend of the occupier. Nevertheless the presumptions under s. 37(c) makes both the inferences irresistible. As the contents of the confectionery tin were in the appellant's actual physical control, and as the circumstances justified the inference that the appellant intended to exercise control over them for his own purposes, he was, in my opinion, rightly found to be in possession of the chandu and chandu dross.

As I explained in *PP v. Chia Leong Foo* [2000] 4 CLJ 649 it is only when there is no direct evidence from which the necessary inference can be made can the court resort to presumptions. Evidence that the first accused knew that the slab he was cutting was dangerous drugs can be gathered from the circumstances in which he supplied the information that led to the recovery of the three slabs from the room. The question asked by PW4 "mana ada baki

barang lagi?" is a clear reference to other illicit objects apart from what the first accused was cutting. His answer shows that he had full knowledge of the objects in respect of which he gave the information. If they were innocent objects there was no reason for him to have responded to the question. The further fact that he was cutting the slab shows that he had every opportunity of knowing what he was cutting in the absence of anything else to preclude such an inference being drawn. In such circumstances it can be inferred that he had knowledge of what he was cutting as explained in *PP v. Phua Keng Tong* [1986] 2 MLJ 279 to which I have made reference earlier. Thus there is direct evidence of possession by the first accused as far as the slab that he was cutting is concerned. With regard to the three slabs recovered from the room the information supplied by him only shows that he had knowledge of them. There is no evidence to show that he had custody and control of them. He was not even an occupier in the house. Thus there is no evidence of possession against him insofar as the three slabs were concerned. They cannot therefore form the subject matter of the charge against him. As I had found that there is direct evidence of possession of the slab that the first accused was cutting, and taking into account its weight and nature as confirmed by the chemist, I invoked the presumption under s. 37(da)(vi) of the Dangerous Drugs Act 1952 ("the Act") and amended the charge to read as follows:

> Bahawa kamu pada 9.10.99 lebih kurang jam 11.00 pagi di rumah nombor 170, Jalan 2/12B Kampong Batu Muda, Jalan Ipoh, Dalam Daerah Sentul, dalam Wilayah Persekutuan, Kuala Lumpur telah didapati mengedar dadah berbahaya iaitu 1,032.4 gram cannabis. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Sek 39(B)(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Sek 39B(2) Akta Dadah Berbahaya 1952.

The first accused claimed trial to the amended charge and did not wish to recall any of the prosecution witnesses. I then ruled that the prosecution had made out a *prima facie* case against the accused on the amended charge and called upon him to enter his defence. Upon the three alternatives being explained to him he elected to give evidence on oath.

The Defence Of The First Accused

The first accused said that on 9 October 1999 he was at home. At about 11am Ahmad Suhaimi telephoned him asking him to go to the second accused's house which was nearby. Ahmad Suhaimi then came to his house. He said that he wanted to take something from the second accused's house. As the first accused said:

> Saya dan Suhaimi pergi ke rumah Rasol dan masuk dalam. Rasol buka pintu dan jemput saya dan Suhaimi masuk. Saya duduk di ruang tamu. Suhaimi terus masuk ke dalam bilik. Pada masa itu Rasol ada di bahagian dapur. Lepas 5 minit kemudian Suhaimi keluar dari bilik dan membawa satu bungkusan. Dia letakkan bungkusan itu di ruang tamu. Lepas itu dia keluar dari rumah

dan menuju ke sebuah van yang ada di depan rumah. Dalam ruang tamu bungkusan dia letak di atas lantai. Saya masuk duduk di atas kerusi di ruang tamu. Jarak dari saya ke bungkusan lebihkurang dua langkah.

Saya tahu Suhaimi pergi menuju ke van kerana pintu rumah tidak tutup. Separuh terbuka. Selepas Suhaimi keluar seorang lelaki Melayu bersenjatakan pistol masuk ke dalam rumah. Dia mengacukan pistol ke arah saya dan selepas itu dia terus menuju ke arah belakang. Pegawai polis yang mengacukan pistol ialah Insp Amir. Saya tak pasti pangkatnya. Pada masa Amir masuk saya sedang duduk di atas kerusi. Bila Amir menuju ke arah belakang seorang lelaki Melayu lagi masuk dengan pistol. Saya tak tahu namanya. Dia menarik belakang baju saya dan menolak saya sehingga saya jatuh tertiarap. Selepas itu dia pijak saya. Selepas itu ada 3-4 lelaki masuk dalam dan terus pukul saya. Selepas saya dipukul mereka tanya mana barang itu. Pada masa itu Rasol baru sampai ke ruang tamu bersama dengan Amir. Selepas itu baru Ahmad Suhaimi masuk ke ruang tamu.

Keterangan polis bahawa semasa mereka masuk saya mencangkung dan sedang memotong satu bungkusan tidak benar. Selain dari bungkusan yang terdapat di atas lantai saya tak pasti sama ada ada benda lain di situ.

Van yang Suhaimi pakai itu kepunyaannya. Apabila Suhaimi keluar dari bilik dengan bungkusan saya tidak tahu apa bungkusan itu. Saya hanya tahu tentang kandungan bungkusan itu selepas polis buat serbuan. Saya biasa pergi ke rumah Rasol. Saya tidak tinggal di rumah Rasol. Pada hari itu saya ada di rumah Rasol selama 5 minit. Kemudian baru saya ditangkap.

In his cross-examination he said:

Pada hari itu saya pergi ke rumah Rasol lebihkurang pukul 11.00 pagi. Saya masuk rumah dan terus duduk di atas kerusi di ruang tamu. Suhaimi terus pergi ke bilik. Dia keluar dari bilik dan bawa satu bungkusan. Dia letak bungkusan di ruang tamu. Selepas itu dia keluar menuju ke sebuah van. Tidak benar semasa Insp Wan Azlan masuk ke dalam rumah saya sedang mencangkung dan memotong slab pertama di P7B. Saya tidak setuju bahawa beliau rampas pisau daripada saya. Saya tak setuju bahawa semasa Insp Azlan sedang bergelut dengan saya Rasol datang dari bahagian belakang rumah dan lari dan dikejar oleh anggota polis yang lain. Selepas Suhaimi ditangkap dia pun dibawa ke ruang tamu. Selepas itu Rasol pun dibawa ke ruang tamu oleh Amir. Pihak polis tanya di mana barang lagi. Mereka memukul dan tanya soalan yang sama. Saya jawab ada. Dia pukul lagi. Kemudian saya katakan kepada Insp Rajendran supaya jangan tangkap Rasol dan isterinya. Selepas itu dia berkata ok. Dia bawa saya ke dalam bilik. Dia menyuruh saya angkat lagi barang di bawah katil. Ada jumpa 3 ketul lagi. Polis yang bawa saya ke bilik itu. Bukan saya. Saya tak setuju saya ada kata ada 3 ketul lagi di bawah katil di bilik. Saya tak setuju polis tidak mengacukan pistol. Saya tak setuju saya bawa polis ke bilik itu. Saya tak setuju saya tunjukkan kepada polis katil itu.

Saya tak setuju saya sedang memotong slab itu. Saya setuju polis ada rampas satu pisau. Ada tandatangan saya di atas P27. Pisau dirampas dari atas lantai. Bila polis ambil bungkusan ada pisau di sana. Saya tak setuju polis ada merampas satu dulang dan surat khabar. Semasa saya tandatangan P27 borang itu kosong. (Saksi dirujuk kepada P6) Saya setuju inilah dulang yang dirampas. Saya tak setuju P15 di atas dulang itu.

Saya ada tandatangan P24. (Saksi dirujuk kepada P15). Saya tak setuju koyakan di sini akibat dari potongan saya.

Bilik itu tidak diduduki oleh isteri Rasol kerana dia bersalin. Asalnya mungkin bilik itu diduduki oleh Rasol dan isteri. S: Saya katakan pada awak bahawa tiga ketul dadah yang dijumpai di bilik adalah kepunyaan awak dan Rasol? Mahkamah: Question not allowed.

Van itu kepunyaan Suhaimi. Van itu jenis Subaru. Warna blue black.

In his re-examination he said:

Dulang dan surat khabar dijumpai di ruang tamu tetapi di bawah meja. Bungkusan itu tidak ada di atas dulang. Saya dapati ada pisau dan dulang semasa polis ambil bungkusan. Pisau ada di bawah meja tetapi di bahagian tepi. Pisau ada bersebelahan dengan bungkusan.

In his submission learned counsel said that the court must evaluate the whole of the evidence adduced and decide whether the defence had created a reasonable doubt in the prosecution case. He said that the accused had denied the prosecution version of the facts. In order for the knife to have traces of cannabis it must have pierced through the slab. There is no evidence of this. The search list (exh. P27) supports the accused's version that the slab was found in front of him. The accused's fingerprints were also not found on the knife. Learned counsel also said that it was Ahmad Suhaimi who took the first accused to the house and brought out a packet from the room. He added that the fact that the drugs could have belonged to Ahmad Suhaimi is sufficient to rebut the presumption of trafficking. In the circumstances, he said, the prosecution ought to have called Ahmad Suhaimi to testify. The learned deputy public prosecutor in his reply said that the basic facts necessary to activate the presumption being proof of possession, the minimum weight and the nature of the drug the only evidence that is capable of rebutting the presumption must be related to such basic facts and nothing else.

The crux of the defence's submission is that the fact that the dangerous drugs belonged to Ahmad Suhaimi is capable of rebutting the presumption under s. 37(da)(vi) of the Act which reads as follows:

> In all proceedings under this Act or any regulation made thereunder:
>
> (da) any person who is found in possession of:
>
> (vi) 200 grammes or more in weight of cannabis;
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

The objection of the prosecution to this submission requires a consideration of the definition of "trafficking" within the meaning of s. 2 of the Act. It states that:

> 'Trafficking' includes the doing of any of the followings acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drugs.

This provision has been a matter of constant judicial concern. In *Teh Geok Hock v. PP* [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 it was held that this "definition" in s. 2 of the Act sounds artificial and not according to the ordinary meaning of the word "trafficking" which is normally understood to mean to trade in, buy or sell, any commodity, albeit often with sinister implications. It is clear that s. 2 of the Act does not define the word "trafficking"; it merely "includes" certain additional acts to what that word means. In *Dilworth and Ors v. The Commissioner of Stamps* [1899] AC 99 it was held that the word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. Thus when it is mentioned that a particular word "includes" certain things it could mean that the legislature wanted to bring in other matters that would not properly come within the ordinary connotation of the word in question (see *Madras Central Urban Bank Ltd v. Corporation of Madras* AIR [1932] Mad 474). The words retain their ordinary meaning. It follows that the words only have extended meaning and do not limit the meaning to the substance of the definition (see *Kantilal Shah v. Charity Commissioners* [1975] 16 Guj UR 594). The word "trafficking" in the Act must therefore be given its ordinary meaning. The legal meaning of "trafficking" as defined in *Black's Law Dictionary* 6th edn is:

> Trading or dealing in certain goods and commonly used in connection with illegal narcotic sales.

In *Ong Ah Chuan v. PP* [1981] 1 MLJ 64 it was held that the verb "to traffic" imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied. It is in this sense that the word "trafficking" in the Act must be understood to mean in the absence of any specific meaning having been attached to it. What s. 2 of the Act does is to declare the eighteen enumerated acts therein as also being included in the meaning of "trafficking". The acts of manufacturing, importing, exporting, selling, administering, delivering, supplying and distributing refer to various ways in which the dangerous drugs can be traded or dealt with or supplied. On the other hand the acts of keeping, concealing, buying, giving, receiving, storing, transporting, carrying, sending or procuring do not refer, in their ordinary meaning, to similar activities. In ascribing the proper meaning to these acts useful reference may be made to *Ong Ah Chuan v. PP* [1981] 1 MLJ 64 where the meaning of the word "transport" in s. 12(a) of the Singapore Misuse of Drugs Act 1973 was considered. As Lord Diplock said at pp. 68-69:

> In their Lordship's view the immediate context of the verb 'transport', to which attention has been drawn, attracts the *maxim noscitur a sociis*. This, and the fact that it appears in the definition of the verb to 'traffic', of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims, all combine to make it clear that 'transport' is not used in the sense of mere conveying or carrying or moving from one place to another but in the sense of doing so to promote the distribution of the drug to another. Supplying or distributing additive drugs to others is the evil against which section 3 with its draconian penalties is directed.

It is my view that a similar process of reasoning must be adopted to interpret the second category of acts that I had referred to earlier. In support I refer to *Chow Kok Keong v. PP* [1998] 2 CLJ 469 where the Federal Court held that the implication in *Teh Geok Hock v. PP* [1989] 2 CLJ 977; [1989] 1 CLJ (Rep) 160 that passive possession of dangerous drugs by carrying, concealing and keeping can amount to trafficking as being "oversimplistic". I also refer to *PP v. Nik Ahmad Aman bin Nik Mansor* [2002] 6 CLJ 369 where Kang Hwee Gee J said at p. 379:

> I am persuaded by the reasoning in *Ong Ah Chuan* that to prove that the accused was trafficking in the context of the instant case, it would still be necessary to prove that he transferred, or at least intended to transfer, possession (or at least custody and control) of the drug to another party. Had it been the intention of the legislature to make the mere acts of transporting, carrying, sending, delivering, procuring, supplying or distributing the drug an offence punishable by death, it would have said so directly in clear language avoiding altogether the word 'trafficking'.

I pause to note that my analysis of the acts specified in s. 2 of the Act in *PP v. Hairul Din bin Zainal Abidin* [2001] 6 CLJ 480 must be read against this background. Thus the mere act of, say, "keeping", or "concealing" or "carrying" dangerous drugs as enumerated in s. 2 of the Act will not constitute "trafficking" without any further evidence of an intention to trade or deal in them. This is where the difficulty arises. Proof of the purpose for which a person is keeping, concealing or carrying dangerous drugs is often difficult to establish. In this regard I refer to *Ong Ah Chuan v. PP* [1981] 1 MLJ 64 where Lord Diplock said at p. 69:

> Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did.

There are many circumstances from which such an inference can be drawn. One such circumstance is the weight of the drugs involved. Where, for example, the quantity of drugs involved is large it can be inferred that they were not kept for personal consumption (see *Ong Ah Chuan v. PP* [1981] 1 MLJ 64). This will facilitate the inference that they were kept for the purpose of trafficking. Where the quantity is very small it can be inferred that they were kept for the purpose of personal consumption and therefore not for trafficking. The object of s. 37(da) of the Act is therefore to enable the court to draw a statutory inference of trafficking based on the quantity of drugs possessed. It must be realised that the basic facts, once proved, create the substantive offence of trafficking by way of a presumption in the absence of direct evidence to that effect. The basic facts, once established, do not in any way control or narrow down the meaning of "trafficking". As I said in *PP v. Chia Leong Foo* [2000] 4 CLJ 649, in dealing with presumptions, at p. 666:

> Thus it operates in place of evidence as it deems certain facts to have been proved (see *Ng Kim Huat v. PP* [1961] MLJ 308. Presumptions therefore do not deal with admissibility of evidence (see *PP v. Cheng Meng Beng & Ors* [1966] 1 MLJ 237) but with a special mode of proving facts which must otherwise be proved by evidence.

The meaning of "trafficking" therefore remains the same. As s. 37(da) of the Act is concerned with the presumption of "trafficking" the offence created is one of trafficking and not any one of the acts enumerated in s. 2 of the Act. It follows that the offence must be understood in its ordinary meaning. Thus any evidence to show that the accused was not in any way involved in trading or dealing with the drugs is capable of rebutting the presumption. It was on this basis that the (then) Supreme Court held in *Cohen Lorraine Philis & Anor v. PP* [1989] 3 MLJ 289 that the presumption of trafficking raised by s. 37(da)

of the Act can be rebutted by evidence to show that it was kept for personal consumption. Similarly in *Mohamad Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 the (then) Supreme Court also held that defence evidence to show that the accused was an innocent and momentary carrier of the drugs while another person was actually the trafficker is capable of rebutting the presumption. I would therefore hold that the presumption arising under s. 37(da) of the Act can be rebutted not only by evidence rebutting the basic facts but also by evidence to show that the accused was not actually trafficking in the drugs.

The defence of the first accused is that he was not cutting the slab of cannabis as claimed by PW4 but that it was placed in the hall by Ahmad Suhaimi. I had, at the close of the case for the prosecution, accepted PW4's evidence on this issue. On a review of this finding against the background of the totality of the evidence adduced doubt has been created in my initial finding. Both PW4 and the first accused testified that at the material time the door leading to the hall of the house was slightly open. It is improbable that the first accused would be handling dangerous drugs without ensuring that the door was properly closed. PW4's evidence that he saw the first accused cutting the slab was weakened by his subsequent testimony. He had initially said that when he opened the door he saw the first accused cutting the slab of cannabis. In his cross-examination he said that all the four slabs recovered were not cut. In his re-examination on this issue he said that he had forgotten when cross-examined by counsel that there are marks on the slab recovered in the hall. This does not really explain the answer he had given in cross-examination. His answer can be taken to mean that his earlier evidence that he saw the first accused cutting the slab was based on the marks found on the slab. In that sense he would not have seen the first accused cutting the slab. If that is true the first accused would not have been in possession of it. Exhibit P27 also confirms that the knife was found in front of the first accused contrary to the evidence of PW4 that he was holding it. No evidence was led to show that the first accused threw the knife when the police arrived in order to neutralise the evidence of PW4 on this issue. The evidence that I have referred to is capable of creating a reasonable doubt in the prosecution case and may support the defence version that the slab of cannabis was placed in the hall by Ahmad Suhaimi. It is settled law that even though a court does not accept or believe the accused's explanation the accused must not be convicted until the court is satisfied that such explanation does not cast a reasonable doubt in the prosecution case (see *Mohamad Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311). The question of whether the defence advanced is capable of raising a reasonable doubt is very much dependent on the evidence of Ahmad Suhaimi. He ought to have been called as a witness. In view of the

significance of his evidence an adverse inference must be drawn against the party bearing the burden to call him as a witness. What therefore arises for determination is the party that should have called him as a witness.

Generally in a criminal trial there is no burden on an accused to call witnesses (see *Goh Ah Yew v. PP* [1949] MLJ 150; *Abu Bakar v. R* [1963] MLJ 288; *Tan Foo Su v. PP* [1967] 2 MLJ 19). Thus no adverse inference can be drawn against the defence for a failure to call witnesses. However, such an inference may be drawn where there is an onus on the accused to prove an issue (see *Baharom v. PP* [1960] MLJ 249). An onus may be placed on the accused in certain instances by statutory presumptions. The legal burden is then on the accused to negate the presumed fact. In order to discharge the burden there will be an onus on the defence to call material witnesses (see *Liew Siew & Anor v. PP* [1969] 2 MLJ 232). Failure to do so will warrant the drawing of an adverse inference. In this case a presumption of trafficking has been drawn against the first accused. The onus is on him to prove, on the balance of probabilities, that he was not trafficking in the drugs. An adverse inference would be drawn against him for failure to call material witnesses on this issue. As to whether Ahmad Suhaimi is a material defence witness in this regard what requires consideration is whether his evidence is required to rebut the presumption of trafficking. It will be recalled that the first accused's evidence is only that Ahmad Suhaimi placed the slab of cannabis in the hall. Such evidence has nothing to do with trafficking in it as defined. It only relates to the question of possession of the slab. Possession is an element which the prosecution must establish before the presumption of trafficking can be raised. Thus the evidence of Ahmad Suhaimi is material to the element of possession and not trafficking. As possession is an element that must be established by the prosecution before the presumption of trafficking can be invoked the responsibility of calling Ahmad Suhaimi as a witness falls squarely on the shoulders of the prosecution. It is true that this part of the defence was not suggested in the course of the case for the prosecution so that the prosecution could have called Ahmad Suhaimi as a witness in the course of its case. However, there was no witness to whom the evidence relating to Ahmad Suhaimi could have been suggested. But the defence did suggest to PW4 that the accused was not cutting the slab of cannabis. That was the best the defence could have done in the circumstances. In any event a failure to suggest the defence in the course of the prosecution case is not fatal. A defence advanced, without having been suggested previously, must still be considered by the court. In this regard Edgar Joseph Jr SCJ said in *Alcontara a/l Ambross Anthony v. PP* [1996] 1 CLJ 705 at p. 718:

> … it is settled law that, although a Court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the Court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rest upon it.

The prosecution is not without remedy for not having had advance notice of the significance of Ahmad Suhaimi in order to have called him as a witness in the course of its case. This is an instance where the prosecution could have lawfully called Ahmad Suhaimi to give evidence in rebuttal. I have considered this area of the law in detail in *PP v. Chia Leong Foo* [2000] 4 CLJ 649. The prosecution has therefore failed to negate a doubt that has been raised. The burden on the prosecution to prove a case beyond reasonable doubt continues till the end of the case. Thus an adverse inference can be drawn against the prosecution for failure to call a material witness even at the end of the case. In the circumstances the failure by the prosecution to call Ahmad Suhaimi as a witness is fatal and it warrants the drawing of an adverse inference. The fact that he was offered to the defence by the prosecution does not alter its obligation to call him as a witness. As I said in *PP v. Chia Leong Foo* [2000] 4 CLJ 649, on the authority of *Abdullah Zawawi v. PP* [1985] 2 MLJ 16, the prosecution cannot, in an attempt to prevent an adverse inference being drawn, offer material witnesses to the defence without calling them to testify if, to do so, would result in there remaining gaps in its case.

In the upshot I was not satisfied that the prosecution had proved its case against the first accused beyond reasonable doubt. Accordingly, I acquitted and discharged him.